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No. 83-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER D. COBURN,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a civil action alleging age discrimination in employment, was the employer's motion for judgment n.o.v. properly granted where (1) plaintiff proved merely that he was 43 years of age, was qualified for the position in which he was employed, and was discharged during a general reduction-in-force while some younger employees were retained and others were later promoted, and (2) the trial court found that reasonable jurors could not have concluded, on the basis of all the evidence, that intentional age discrimination occurred?

LIST OF PARTIES

The names of all parties to the proceeding are contained in the caption.

Respondent Pan American World Airways, Inc. has no parent company. Other than wholly-owned subsidiaries, the subsidiaries and affiliates of respondent are:

Company	Incorporated Under Laws Of
Acerias Paz del Rio, S.A.	Colombia
Aeronautical Radio, Inc.	Delaware
Agropecuaria Fluminense, S.A.	Brazil
Air Cargo, Inc.	Delaware
Air Carrier Supply, Inc.	Florida
Airline Tariff Publishing Co.	District of Columbia
Ariana Afghan Airlines, Ltd.	Afghanistan
Companhia Hoteleira Novos Horizontes, S.A.	Brazil
Delsud Inversora, S.R.L.	Argentina
Escola Americana de Rio de Janeiro	Brazil
Hadrian, Ltd.	Bermuda
Honolulu Fueling Facilities Corp.	Hawaii
International Aeradio (Caribbean) Ltd.	Trinidad
Liberian Development Corp.	Liberia
Manhattan Air Terminal, Inc.	New York
New York Airways, Inc.	Delaware
Private Investment Company for Asia, S.A.	Panama
Promotora de Hoteles de Turismo Medellin, S.A.	Colombia
Radio Aeronautica Paraguaya, S.A.	Paraguay
Social Immobiliaria Norte America, S.A.	Argentina
Societe International de Telecommunications Aeronautiques	Belgium

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PETER D. COBURN,

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v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Pan American World Airways, Inc., respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the District of Columbia Circuit in this case.

OPINIONS BELOW

The June 28, 1983 opinion of the Court of Appeals is reported at 711 F.2d 339 and appears in the Appendix to the petition ("Pet. App.") at p. 1. The July 29, 1983 orders of the Court of Appeals denying rehearing and rehearing en banc appear in the Appendix to the petition at pp. 11-12.

The May 7, 1982 memorandum opinion and judgment of the District Court, which granted respondent's motion for judgment n.o.v., are unreported. Because they are not included in the appendix to the petition, respondent has reproduced them in Respondent's Appendix to this brief ("Resp. App."), at pp. 1a and 10a. The District Court's September 28, 1982 order restating the grant of judgment n.o.v., and conditionally granting respondent's alternative motion for a new trial, is reproduced in Respondent's Appendix at p. 12a.

JURISDICTION

The opinion of the Court of Appeals was entered on June 28, 1983. The orders denying rehearing and rehearing en banc were entered on July 29, 1983. The petition for a writ of certiorari was filed on September 27, 1983. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petition seeks review of an opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court's grant of respondent's motion for judgment notwithstanding the verdict, pursuant to Rule 50(b), Fed. R. Civ. P., in a civil action brought by petitioner under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA").

Proceedings In the District Court

Petitioner, who had been employed by respondent for 16 years in various management positions, was discharged

from his employment in August, 1980, during a worldwide reduction-in-force carried out by respondent, a corporation in serious financial trouble. Petitioner was 43 years old at the time.

Petitioner brought a civil action in the United States District Court for the District of Columbia, contending that his discharge resulted from age discrimination violative of ADEA. He amended his complaint to state an additional claim of sex discrimination violative of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). In March, 1982, petitioner's ADEA claim was tried to a jury, while the court conducted a simultaneous bench trial of the Title VII claim. Respondent moved for a directed verdict at the close of petitioner's case and again after all the evidence had been presented; both motions were denied. The jury returned a verdict for petitioner on the ADEA claim and awarded him $26,820 in damages. The court, however, announced that it would enter judgment for respondent on the Title VII claim.

Respondent filed a timely motion for judgment n.o.v. on the ADEA claim, pursuant to Rule 50(b), Fed. R. Civ. P. The District Court granted the motion, finding that petitioner had failed to present substantial evidence to establish a prima facie case of discrimination within the meaning of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), and that, even if petitioner had established his prima facie case, respondent had articulated a legitimate nondiscriminatory reason for its treatment of petitioner, and petitioner had failed to present substantial evidence on the basis of which a reasonable jury could have found that respondent's explanation

was a pretext for intentional discrimination. (Resp. App. at 4a, 7a, 8a.)[1] The court also concluded that "[n]one of the evidence presented in this case is conducive to the inference that [petitioner] was terminated because of his age" (Resp. App. at 7a), and that "[t]he record simply is devoid of any indication that discriminatory animus on the basis of age played a part in [respondent's] decision to terminate [petitioner's] employment" (Resp. App. at 9a).

The material evidence presented to the jury was undisputed. For more than one year prior to his discharge, petitioner was one of four "Reservations Supervisors" working in respondent's Washington, D.C. Reservations and Ticket Office. The Reservations Supervisors were salaried, nonunion management employees who were responsible for supervising the work of unionized sales agents who answer telephones and make reservations for passengers on respondent's airline, using computer terminals connected to a computerized reservations system. Petitioner's primary day-to-day job assignment consisted of supervising a "Reservations Operations Center," in which he monitored a central telephone console and routed incoming calls to available sales agents. (Tr. 80-87, 734.)[2]

During 1980, respondent's financial condition deteriorated to the point where the company's ability to survive was in issue, and respondent's senior management instituted a number of severe economy measures, which included the sale of respondent's major nonoperating as-

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[1]Petitioner now misreads the District Court's opinion, twice asserting incorrectly that the District Court found only "that petitioner had failed to establish a prima facie case of age discrimination." (Pet. at 2, 5.)

[2]Citations in the form "Tr." refer to the trial transcript.

sets, cutbacks in airline service, a general wage reduction, and a management reduction-in-force. Under the reduction-in-force, each corporate department was required to reduce its management staff by 15% in August, 1980. If a department failed to achieve this reduction as the result of transfers, resignations, and retirements (including voluntary early retirements), the department was required to select additional management employees for involuntary separation. (Tr. 250-52, 510-19, 736.)

During the course of the reduction-in-force, the manager of respondent's Washington, D.C. Reservations and Ticket Office was instructed to recommend one management employee for involuntary separation. (Tr. 574-76.) Following respondent's written procedures "to the letter" (Pet. App. at 7), the office manager then designated a "peer group" consisting of all four Reservations Supervisors working in the Reservations and Ticket Office, and completed a written "peer group analysis" in which the qualifications, abilities, and productivity of each of the peer group members were evaluated in comparative terms. Petitioner ranked lowest in the peer group, even though in accordance with respondent's policy he received *extra* credit in the peer group analysis for being more than 40 years old.[3] Accordingly, the office manager recommended petitioner for separation, and he was in fact discharged, effective August 31, 1980. (Tr. 575-83, 596-98, 610-15, 736-38.)

[3]The three other members of the peer group were 37, 39, and 51 years old. (Pltf's Ex. 15.) All were retained.

When petitioner was discharged, his position ceased to exist. No one replaced him as a Reservations Supervisor, and his job duties were split up among the remaining Reservations Supervisors. (Tr. 463, 665-66.) Several months later, respondent's reservations system was combined with that of National Airlines, a company that respondent had acquired early in 1980. Respondent's Washington, D.C. Reservations and Ticket Office was expanded to include a number of former National Airlines reservations agents and supervisors, who had become employees of respondent. Following the office consolidation, several management employees, including former National Airlines employees, were promoted, transferred, or reclassified without promotion. (Tr. 560-74.)[4]

There was no disagreement at trial regarding petitioner's qualifications to work in the position of Reservations Supervisor. Six months prior to his discharge he had received an annual job performance rating of "Good" (though he was also rated the poorest performer of the four Reservations Supervisors, in comparative terms). (Tr. 630, 735-36.) When petitioner was discharged, the cause was not an inability to perform his job duties, but rather the simple

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[4]Petitioner's discharge also occurred during a period in which respondent's management workforce was being substantially cut back. Prior to the August, 1980 reduction-in-force, the separate Pan Am and National Airlines reservations offices included a total of 185 sales agents and 10 management employees. By August, 1981, the consolidated Reservations and Ticket Office employed 191 unionized sales agents and only 6 management employees. Between June and December, 1980, the total number of management employees in the "region" that included petitioner's office declined from 80 to 58. There were no management vacancies in the region after petitioner's termination. (Tr. 430, 540-43, 560-74.)

fact that in the peer group analysis he received the lowest rating of any Reservations Supervisor.

Petitioner produced no direct evidence of discriminatory animus, but merely expressed his disagreement with the outcome of the peer group analysis and with the business judgments that led to his discharge.[5] At no time has petitioner produced any evidence, direct or circumstantial, suggesting that any officer or employee of respondent treated petitioner adversely because of his age, or even took his age into account at all – except as a basis for giving him extra credit in the peer group analysis in accordance with respondent's standard policy.[6]

Respondent's motion for judgment n.o.v. was accompanied by a motion in the alternative for a new trial, which

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[5]Throughout this litigation, petitioner has substituted arguments for evidence and then attempted to premise inferences of discrimination on his own arguments. In this Court, for example, petitioner incorrectly asserts that "the jury had heard" that petitioner's peer group was incorrectly constituted under respondent's guidelines for the reduction-in-force. (Pet. at 7.) In fact, the jury heard no such testimony; it was undisputed in the evidence that respondent's guidelines were followed in connection with the peer group analysis and petitioner's discharge. (Tr. 443.) Both the trial court and the Court of Appeals so held.

[6]Petitioner is incorrect when he asserts (Pet. at 5) that the proffered testimony of one William Ferchak, which was excluded by the District Court, had any bearing on petitioner's age discrimination claim. Ferchak's testimony would have concerned only petitioner's Title VII claim of sex discrimination, which is not before this Court. Indeed, petitioner's counsel expressly stated at trial that Ferchak's proffered testimony "only goes to the sex claim" and "has nothing to do with the jury deliberations, or any of the issues that would be resolved concerning the age claim" (Tr. 584-85), and that she did not propose to have Ferchak testify before the jury (Tr. 200/F). The exclusion of this testimony was challenged by petitioner on appeal and was affirmed by the Court of Appeals. (Pet. App. at 10.)

was conditionally granted by the District Court on September 28, 1982. (Resp. App. at 12a.)[7]

The Decision Of The Court Of Appeals

The Court of Appeals approved the District Court's use of the *McDonnell Douglas* "evidentiary guidelines" to allocate the order and burdens of proof. (Pet. App. at 4.) Disagreeing with the District Court, however, the Court of Appeals concluded that petitioner had made out a *McDonnell Douglas* prima facie case by showing simply that (1) he was 43 years old, (2) he was qualified as a Reservations Supervisor, and (3) he was dismissed, while (4) younger employees were retained and others later promoted. (Pet. App. at 6.)

The Court of Appeals correctly recognized that this minimal showing did not resolve the ultimate issue presented by respondent's motion for judgment n.o.v., which was "whether reasonable jurors could have decided on the basis of the evidence at trial that [petitioner's] age was a determining factor in [respondent's] decision to fire him." (Pet. App. at 5.) The court acknowledged that it would be relatively easy for an employee discharged in a general reduction-in-force to make a first-stage *McDonnell Douglas* showing, but stated that in its view "the exigencies of a reduction-in-force can best be analyzed at the stage

[7]The District Court had originally denied the alternative new trial motion. (Resp. App. at 10a.) On respondent's motion, the Court of Appeals remanded petitioner's appeal to permit the District Court to reconsider its denial of the new trial motion. On reconsideration, the District Court entered its September 28, 1982 order restating the grant of judgment n.o.v. and conditionally granting the alternative motion for a new trial. (Resp. App. at 12a.) The order of September 28, 1982 was affirmed by the Court of Appeals in its decision of June 28, 1983.

where the employer puts on evidence of a nondiscriminatory reason for the firing. In this manner the employee always retains the burden of proving discrimination while the employer's situation is analyzed on a case-by-case basis." (Pet. App. at 7.)

The Court of Appeals then considered and rejected each of petitioner's attempts to premise an inference of intentional age discrimination on speculation or argument rather than evidence. Thus, the court found there was *no evidence* that a disproportionate number of older employees had been terminated in the reduction-in-force (Pet. App. at 8), *no evidence* that might justify an inference of age-discriminatory animus based on respondent's voluntary early retirement program (*id.*), *no evidence* that petitioner's "peer group" was improperly constituted under respondent's procedures (*id.* at 9), *no evidence* that the peer group analysis was manipulated to petitioner's disadvantage or that petitioner's rating in the peer group analysis was inconsistent with his earlier performance assessment (*id.*), and *no evidence* that the promotion of other employees indicated discrimination against petitioner (*id.*). Finding the record "devoid of any evidence" that age was a determining factor in petitioner's termination, the Court of Appeals affirmed the grant of judgment n.o.v. (*Id.* at 10.)

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS PLAINLY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND PRESENTS NO IMPORTANT ISSUES FOR REVIEW.

1. The very decision on which petitioner relies, *United States Postal Service Board of Governors* v. *Aikens,* 103 S.Ct. 1478 (1983) ("*Aikens*"), makes clear that this case was correctly decided by the Court of Appeals and presents no important issues for review in this Court. *Aikens* confirms that whether or not an employment discrimination lawsuit is tried under the procedure of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973) ("*McDonnell Douglas*"), the ultimate issue at all times is whether intentional discrimination occurred, and that as to this issue, the plaintiff always retains the burden of persuasion. *Aikens, supra,* at 1482. *Aikens* teaches that in deciding such a case after it has been fully tried, the trier of fact must consider the totality of the evidence, deciding the ultimate issue of intentional discrimination "directly, just as district courts decide disputed questions of fact in other civil litigation." *Id.* (footnote omitted). And *Aikens* also teaches that neither "trial courts [n]or reviewing courts should treat discrimination differently from other ultimate questions of fact," and that in deciding whether the evidence presented at trial supports a finding of discrimination, the courts should simply not apply "legal rules which were devised to govern the 'allocation of burdens and order of presentation of proof.' " *Id., quoting Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 252 (1981) ("*Burdine*").

The special significance of the *McDonnell Douglas* prima facie case is that it generates a presumption of un-

lawful discrimination and imposes on the defendant, if it is to avoid a judgment against it, an obligation to articulate through admissible evidence a legitimate nondiscriminatory reason for its actions. *Burdine, supra,* 450 U.S. at 254-55. But *Burdine* held, and *Aikens* confirms, that once the employer has responded to the prima facie case and sustained its burden of production, "the factual inquiry proceeds to a new level of specificity." *Burdine, supra,* 450 U.S. at 255. The presumption of discrimination "drops from the case;" the "legally mandatory inference of discrimination arising from the plaintiff's initial evidence" is destroyed. *Id.* at 255 n.10. The plaintiff's initial evidence and all inferences properly drawn therefrom may of course be considered in deciding the ultimate question of discrimination, *id.*, but neither that evidence nor any properly derived inferences possess any special significance by virtue of their earlier relationship to plaintiff's prima facie case. Once the factual inquiry has moved to the "new level of specificity," the question whether the plaintiff previously established a prima facie case "is no longer relevant." *Aikens, supra,* 103 S.Ct. at 1482.

Petitioner contends that the plaintiff's proof of a prima facie case at some point during a trial completely insulates a subsequent jury verdict from review on defendant's motion for judgment n.o.v. Far from supporting his proposition (as petitioner maintains), *Aikens* precludes its acceptance. Indeed, it has been apparent at least since *Burdine* that the decision of the trier of fact on the ultimate factual question of employment discrimination is subject to ordinary standards of review. *Cf. Pullman-Standard* v. *Swint,* 456 U.S. 273 (1982) ("clearly erroneous" standard of Rule 52(a) applies to finding of discriminatory intent under § 703(h) of Title VII).

In *Aikens,* the Court expressed its surprise at finding the parties still debating, after the completion of a full trial, whether plaintiff had made out his prima facie case. *Aikens, supra,* 103 S.Ct. at 1481. Here, petitioner similarly has fastened on the wrong question. In considering respondent's motion for judgment n.o.v., the question to be answered is whether the record evidence is such that "there can be but one reasonable conclusion as to the verdict." *Brady* v. *Southern Ry.,* 320 U.S. 476, 479 (1943). *See Moore* v. *Chesapeake & Ohio Ry.,* 340 U.S. 573, 578 (1951) ("Speculation cannot supply the place of proof."). The two courts below have correctly answered that question, concluding on the basis of all the evidence that no reasonable jury could have found intentional discrimination in this case.

2. This case in any event does not provide an appropriate occasion for consideration of petitioner's argument that establishment of the prima facie case *always* excludes the possibility of judgment n.o.v. The case is complicated by the Court of Appeals' deliberate adoption of a minimal, undemanding formulation of the prima facie case.

Presented with the need to examine an individual employment action that took place during the course of a general reduction-in-force affecting many employees, the Court of Appeals expressly decided to define the prima facie case in minimal terms so that the ultimate factual question of unlawful discrimination might readily be reached and decided. Virtually every employee who is separated in a reduction-in-force and is in the protected age group will be able to make out a prima facie case as the Court of Appeals now defines it, since virtually every such person will be able to prove that he was qualified for the job he held but lost it while some younger employee was

retained. Respondent objected below to any formulation of the prima facie case in such terms. The Court of Appeals was persuaded, however, that "the exigencies of a reduction-in-force can best be analyzed" when the employer's defense is articulated and tested, following establishment of the prima facie case. (Pet. App. at 7.)

The approach adopted by the Court of Appeals is uncommonly generous to ADEA plaintiffs. Other Circuits have declined to rule that prima facie ADEA cases were made out on the basis of evidentiary showings similar to the showing made by petitioner in this case, precisely because such meager evidence provides no reasonable foundation for an inference of unlawful age discrimination. *E.g., Williams* v. *General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982);[8] *Sahadi* v. *Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980) (per curiam). *See Pace* v. *Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983).[9] Indeed, the approach of

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[8]In *Williams* v. *General Motors Corp.*, the Fifth Circuit held that in order to establish a prima facie case based on layoffs occurring during a reduction-in-force, an ADEA plaintiff must establish that (1) he was within the protected age group and was adversely affected by an employment decision; (2) he was qualified to assume another position; and (3) there was "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." 656 F.2d at 129-30. To establish the third element, the plaintiff is required to introduce evidence that "must lead the factfinder reasonably to conclude either (1) the defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) that defendant regarded age as a negative factor in such consideration." *Id.*

[9]In *Pace* v. *Southern Railway System*, decided prior to the decision below, the Eleventh Circuit reviewed a number of leading cases delineating the elements of the prima facie ADEA claim, and concluded that "*in no case* does the court hold that as a matter of law a prima facie case is established if a plaintiff simply shows he is in the

the court below seems inconsistent with the concept that a "*McDonnell Douglas* prima facie showing . . . is . . . proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 579-80 (1978). It is not, we submit, realistic to say that the minimal prima facie case defined by the Court of Appeals compels an inference of discrimination.

This is, in short, the wrong case in which to consider the question whether a *well-founded* prima facie case would provide absolute protection against the possibility of judgment n.o.v. And it is the wrong case in which to revisit the task of defining the prima facie case itself, since petitioner is satisfied with the definition adopted by the Court of Appeals and respondent is satisfied with that court's ultimate judgment in the case.

3. Contrary to petitioner's suggestion (Pet. at 11, 17), the decision of the Court of Appeals affirming judgment n.o.v. does not conflict with the decision of any other Circuit. The other Circuits have consistently approved directed verdicts or judgments n.o.v. for employers in ADEA lawsuits in which the plaintiffs established (or were assumed to have established) prima facie cases. *E.g., Lovelace* v. *Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982) (judgment n.o.v.); *Bohrer* v. *Hanes Corp.*, __ F.2d __, 32 FEP Cases (BNA) 1578 (5th Cir., Sept. 23, 1983)

protected group, was adversely affected by an employment decision, was qualified and was replaced by one younger than himself. In each of these cases not only was the plaintiff replaced by someone younger but there was also *other evidence of discrimination based on age.*" 701 F.2d at 1390 (emphasis added).

(affirming judgment n.o.v. and holding that "[p]rima facie proof of age discrimination does not necessarily entitle the plaintiff to a jury determination of his claim");[10] *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 291 (8th Cir. 1982) (directed verdict); *Douglas* v. *Anderson*, 656 F.2d 528 (9th Cir. 1981) (directed verdict). *Cf. Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1218 (7th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 959 (1981) (summary judgment for employer is appropriate even if prima facie case is assumed, where "plaintiff had no indications of motive and intent, supportive of his position, to put on the scales for weighing"); *Steckl* v. *Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983) (establishment of prima facie case does not bar summary judgment for employer).

The three decisions cited by petitioner as evidence of a supposed conflict among the Circuits (Pet. at 11-12) are not on point. In *Spagnuolo* v. *Whirpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981), and *Hagelthorn* v. *Kennecott Corp.*, 710 F.2d 76 (2d Cir. 1983), the plaintiffs did not rely on inferences of discrimination derived from circumstantial evidence through the *McDonnell Douglas* order of proof, but instead introduced *direct* evidence of discriminatory motive; the courts of appeals merely held that those plaintiffs were entitled to have juries weigh their direct evidence together with the employers' competing evidence. Similarly, in *Tribble* v.

[10]In another recent ADEA case similar to the one presented here, the Fifth Circuit has applied *Aikens* and specifically rejected plaintiffs' argument that they were entitled to take their case to the jury on the strength of their basic *McDonnell Douglas* prima facie showing. *Elliott* v. *Group Medical & Surgical Service*, __ F.2d __, 32 FEP Cases (BNA) 1451, 1457 (5th Cir., Sept. 16, 1983). The court also held that "generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory reason for his discharge." *Id.*

Westinghouse Electric Corp., 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1767 (1983), denial of the employer's motion for judgment n.o.v. was affirmed because "[e]vidence was presented from which the jury could infer that the reason for plaintiff's discharge was age." *Id.*, 669 F.2d at 1196. *See Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 292 n.6 (8th Cir. 1982) (distinguishing *Tribble*). In contrast, petitioner here acknowledges his inability to present direct evidence of discriminatory motive and argues instead that his proof of a minimal prima facie case assures that his jury verdict must stand even though two courts have held that the record is devoid of evidence from which a reasonable jury could have drawn an inference of discrimination. Petitioner's argument has not, to our knowledge, been adopted by any court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1983

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff brings this action against Pan American World Airways claiming employment discrimination on the basis of age.[1] On September 11, 1981, this Court issued a Memorandum Opinion which dismissed all of plaintiff's claims of age discrimination except for those under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, premised on acts which occurred after October 30, 1979. The ADEA claim which remains in the case is premised on defendant's termination of plaintiff's employment on August 31, 1980.

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[1]Plaintiff also claims employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Contemporaneous with this Memorandum Opinion we have issued Findings of Fact and Conclusions of Law in plaintiff's Title VII action. As the events which form the basis of plaintiff's ADEA and Title VII claims are the same, we incorporate those Findings of Fact in this Memorandum Opinion.

A trial by jury on plaintiff's ADEA action began on March 16, 1982. At the close of plaintiff's case, and again at the close of all the evidence, defendant moved for a directed verdict. In both instances, we denied defendant's motion without prejudice.[2] On March 19, 1982, the jury returned a verdict in favor of plaintiff, finding that the termination of plaintiff's employment resulted from willful age discrimination by defendant. On April 2, 1982, we entered judgment in accordance with the jury's verdict.

Defendant moves for judgment notwithstanding the verdict, or, in the alternative, for a new trial. For the reasons which follow, we grant defendant's motion for judgment notwithstanding the verdict and deny its alternative motion for a new trial.

DISCUSSION

I. Standard of Review

We are mindful that a trial court must enter judgment contrary to the verdict of a duly constituted jury only when the court concludes that "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Vander Zee v. Karabatsos,* 589 F.2d 723, 726 (D.C.Cir. 1978); *Murphy v. United States,* 653 F.2d 637, 640 (D.C.Cir. 1981). The evidence and accompanying inferences must be viewed in the light most favorable to the non-moving party, *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F.2d 163, 167-68 (2d Cir. 1980),

[2]While this Court was inclined to grant defendant's motion for a directed verdict, in the interest of judicial efficiency we reserved decision on the motions to allow the case to go to the jury. *Mattivi v. South African Marine Corp. "Huguenot",* 618 F.2d 163, 169 (2d Cir. 1980); *Law v. Virginia Stage Lines, Inc.,* 444 F.2d 990, 995 (D.C.Cir. 1971).

and if "fair-minded" jurors in the exercise of "impartial judgment" might disagree on the conclusion to be drawn from that evidence, the court must not grant judgment notwithstanding the verdict. *Boeing Company v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969).

The jury's verdict, however, must be based on more than mere speculation to withstand a motion for judgment notwithstanding the verdict. *Moore v. Chesapeake and Ohio Railway Co.,* 340 U.S. 573, 578 (1951). It is vulnerable to such an attack if it "could only have been the result of sheer surmise and conjecture." *Mattivi, supra,* at 168. A mere scintilla of evidence is not enough to support the decision of a jury. *Tackett v. Kidder,* 616 F.2d 1050, 1053 (8th Cir. 1980). Instead, "substantial" evidence must underlie the verdict. *Gehrhardt v. General Motors Corporation,* 581 F.2d 7, 14 (2d Cir. 1978).

II. Plaintiff's ADEA Claims

Section 623(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), provides

> It shall be unlawful for an employer- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

An age discrimination claimant must satisfy a two-step process to establish an entitlement to recovery under the ADEA. First, plaintiff must prove all the elements of a prima facie case of discrimination. The burden then shifts to defendant to present some "legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). If

defendant does so, the second step which plaintiff must handle is to prove that by a preponderance of the evidence, "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). We conclude that the evidence presented at trial, and all inferences which can be derived therefrom, cannot support a jury verdict that plaintiff has established a prima facie case of discrimination. Further, even assuming that the jury could properly conclude that plaintiff has proved its prima facie case, the evidence is insufficient to support a jury finding that defendant's reasons for terminating plaintiff's employment were but a pretext for discrimination.

A. Prima Facie Case

The Supreme Court has identified the relevant factors which combine to create a prima facie case of discrimination under Title VII. *Texas Department of Community Affairs, supra,* at 253-54; *McDonnell, supra,* at 802. In *McDonnell,* the Court concluded that plaintiff had to establish

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell, supra, at 802.

In *McDonnell,* the Court observed that the elements of a prima facie case will vary depending upon the particular

circumstances of the Title VII claim. *McDonnell, supra,* at 802 n. 13. However, the basic framework for a prima facie case of discrimination under Title VII applies fully to a claim of age discrimination under the ADEA. *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1010 (1st Cir. 1979).

To establish a prima facie case of discrimination resulting from a dismissal pursuant to a reduction-in-force, a claimant must prove by a preponderance of the evidence that (1) he was within a class protected by the ADEA, (2) he performed his job satisfactorily and (3) he was discharged under circumstances which give rise to an inference of unlawful discrimination. *Douglas v. Anderson,* 656 F.2d 528, 531 (9th Cir. 1981). Direct evidence of discriminatory motive on the part of defendant is not necessary for a prima facie showing. *Daye v. Harris,* 655 F.2d 258, 262 (D.C.Cir. 1981). Yet, plaintiff must present some evidence, be it direct or circumstantial, from which a jury may infer that unlawful discrimination was a likely cause of the dismissal. *Douglas, supra,* at 532.[3] Without

[3]Plaintiff contends that under *Daye v. Harris, supra,* no evidence beyond the membership of plaintiff in the statutorily protected class, and his performance of satisfactory work, need be shown to infer that discrimination motivated defendant's decision to dismiss plaintiff. *Daye,* however, holds only that direct evidence is not necessary to the establishment of a prima facie case. It does not stand for the proposition that circumstantial evidence is also unnecessary. Under *Texas Department of Community Affairs, supra,* decided by the Supreme Court subsequent to the Court of Appeals decision in *Daye,* plaintiff must show "circumstances which give rise to an inference of unlawful discrimination" to prove his prima facie case. If such an inference is automatic upon the simple showing of membership in a protected class and satisfactory work performance, it would render superfluous the requirement that the circumstances give rise to an inference of discrimination. Clearly, some evidence is necessary upon which to base such an inference beyond a simple showing of the first two elements of the prima facie case.

doubt, plaintiff established the first two elements of a prima facie case: he comes within the class protected by the ADEA, and during his employment with Pan American he performed satisfactorily. However, the record is utterly devoid of evidence of any type from which a reasonable juror could infer that a likely cause of plaintiff's termination was his age.[4] The evidence demonstrates only that defendant, as a part of a company wide reduction-in-force, conducted a comparative assessment of the four Reservations Supervisors in its Washington, D.C. office. As a result of that "peer group analysis," it concluded that plaintiff was the least competent performer. One of the Reservations Supervisors retained by defendant, Mualla Peck, was substantially older than plaintiff. Moreover, the uncontradicted evidence indicates that plaintiff actually received additional points in the peer group analysis for being over forty years of age. Although several months after plaintiff's discharge the number of Reservations Supervisors was increased, there is no dispute that the increase resulted from the merger of the National Airlines office with that of Pan American.

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[4]In denying defendant's motion for summary judgment, we concluded that plaintiff, for purposes of that motion, had made out a prima facie case. At that time, we noted that the applicable test was first an assumption that all of the plaintiff's allegations are true, and second, an analysis of whether those presumptively true facts make out a prima facie case of age discrimination. In the present posture of this case we apply a different test: Judgment n.o.v. will be granted only if "the evidence, together with all inferences that can reasonably be drawn therefrom is one-sided that reasonable men could not disagree on the verdict." *Vander Zee, supra,* at 726. We need not accept all of plaintiff's allegations as true, as in the summary judgment context, but we instead examine whether substantial evidence provided at trial, as well as all permissible inferences derived therefrom, supports the verdict of the jury. *Tackett, supra,* at 1053. As set forth in more detail above, we conclude that no reasonable jury could find that plaintiff made out a prima facie case of age discrimination.

None of the evidence presented in this case is conducive to the inference that plaintiff was terminated because of his age. For a jury to so infer, it would have to resort to "sheer surmise and conjecture," an insufficient basis to support a verdict. *Mattivi, supra,* at 168.

B. Defendant's Articulated Reason for Terminating Plaintiff's Employment

Even assuming that the evidence was sufficient for the jury to conclude that plaintiff had established a prima facie case of discrimination, we hold that the verdict must be set aside. Defendant articulated a legitimate, non-discriminatory reason for dismissing plaintiff, and insufficient evidence was presented to demonstrate that defendant's articulated reason was merely a pretext for discrimination. *Texas Department of Community Affairs, supra,* at 254-56.

Defendant contends that plaintiff's employment was terminated only after defendant conducted a peer group analysis pursuant to established Pan American procedures in which plaintiff was compared with other employees in the same area having the same job description and performing essentially the same job functions. Dismissal of admittedly satisfactory employees resulted from a reduction-in-force made necessary by severe financial difficulties which Pan American experienced at that time. Plaintiff attacks various "inaccuracies and inconsistencies" in the analysis but fails to present any evidence from which a juror could conclude or infer that any discriminatory animus underlay the comparative process by which defendant reached its decision.

> While an employer's judgment or course of action may seem poor or erroneous to outsiders,

> the relevant question is simply whether the given reason was a pretext for illegal discrimination . . . . An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.

Loeb v. Textron, supra, at 1012 n. 6.

In other words, as this court has previously observed in the context of a Title VII action, "an employer may make an employment decision for a good reason, a bad reason, or no reason at all," so long as impermissible discriminatory distinctions do not influence that decision. *Winston v. Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 473 (D.D.C. 1977).

In the present case, the jury's determination that the process defendant utilized to dismiss plaintiff was a pretext for age discrimination has no evidentiary support and is wholly speculative. No reasonable juror could conclude that plaintiff has proven such an assertion by a preponderance of the evidence.

CONCLUSION

Peter Coburn's story appeals to the sympathy of this Court, as it apparently did to the jury. The record reflects that Mr. Coburn devoted long years of service to Pan American and derived justified pride from that effort. Yet it must not be forgotten that the law under which plaintiff brings suit provides for recovery only in the event that defendant terminated plaintiff's employment because of his age. Neither the Court nor the jury may find for the plaintiff in order to reward past services to defendant or

because of some general feeling that plaintiff deserved better from his longstanding employer. "[T]he question for the jury was not whether plaintiff was treated fairly but whether discrimination occurred." *Sahadi v. Reynolds Chemical,* 636 F.2d 1116, 1117 (6th Cir. 1980).

The record simply is devoid of any indication that discriminatory animus on the basis of age played a part in defendant's decision to terminate plaintiff's employment. Reluctantly, we are compelled to grant judgment for defendant notwithstanding the verdict rendered by the jury. We deny defendant's motion in the alternative for a new trial.

An order consistent with the foregoing has been entered this day.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

May 7th, 1982.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

Upon consideration of defendant's motion for judgment notwithstanding the verdict rendered by the jury in the above captioned case on March 19, 1982 and pursuant to which a judgment of this Court was entered on April 2, 1982, or in the alternative for a new trial, the memoranda of points and authorities in support and opposition thereto, and the entire record herein, it is by the Court this 7th day of May, 1982,

ORDERED, ADJUDGED AND DECREED that defendant's motion for judgment notwithstanding the verdict is granted, the judgment of this Court entered on April 2, 1982 is vacated, and judgment is entered in favor of the defendant, and it is

FURTHER ORDERED that defendant's motion in the alternative for a new trial is denied, and it is

FURTHER ORDERED that plaintiff's motions for additional back wages, prejudgment interest, reinstatement, and liquidated damages are denied.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

FILED
May 7, 1982
JAMES F. DAVEY, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	
	)	
	)	
Defendant.	)	

ORDER

Upon remand by the United States Court of Appeals to permit consideration of appellee's motions with respect to plaintiff's ADEA claims to amend this Court's judgment of May 7, 1982, and after reconsideration of said judgment of May 7, 1982, it is concluded that appellee's motion should be granted and our judgment amended pursuant to Rule 50(c)(1), Fed.R.Civ.P., and in the exercise of our discretion, it is by this Court this 27th day of September, 1982,

ORDERED that defendant's motion for judgment notwithstanding the verdict with respect to plaintiff's ADEA claims is again granted, the judgment entered on April 2, 1982 is vacated, and judgment n.o.v. entered in favor of the defendant; and it is

ORDERED that defendant's motion, in the alternative, for a new trial, which was previously denied, is conditionally granted; and it is

FURTHER ORDERED that plaintiff's motions for additional backpay, prejudgment interest, reinstatement, and liquidated damages are again denied.

/s/J. H. Pratt
John H. Pratt
United States District Judge

FILED
Sep. 28, 1982
JAMES F. DAVEY, Clerk